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No. 10-18

IN THE
SUPREME COURT OF THE UNITED STATES

WEBSTER M. SMITH,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR AMICUS CURIAE, UNITED STATES ARMY DEFENSE APPELLATE DIVISION IN SUPPORT OF PETITIONER

MARK TELLITOCCI
Colonel, United States Army
Chief, Defense Appellate Division

JESS ROBERTS
Captain, United States Army
Appellate Counsel
Defense Appellate Division

JONATHAN POTTER
Lieutenant Colonel,
United States Army
Senior Appellate
Counsel
Defense Appellate
Division
901 N. Stuart Street
Arlington, VA 22203
(703) 588-6717
jonathan.potter@
conus.army.mil
Counsel of Record

QUESTION PRESENTED

When a trial judge's restriction on the cross examination of a prosecution witness is challenged on appeal as a violation of the Confrontation Clause, is the standard of review de novo, as five circuits have held, or abuse of discretion, as six other circuits (and the court of appeals here) have concluded?

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BRIEF FOR AMICUS CURIAE, UNITED STATES ARMY DEFENSE APPELLATE DIVISION IN SUPPORT OF PETITIONER

The United States Army Defense Appellate Division respectfully submits this brief as *amicus curiae* in support of the petitioner.

INTEREST OF AMICUS CURIAE

The United States Army Defense Appellate Division represents individual Soldiers who have been convicted by court-martial and who have been adjudged either a punitive discharge or confinement for one year or more. Defense Appellate Division

lawyers, all of whom are Judge Advocates, represent these individuals at the Army Court of Criminal Appeals, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States.[1] The Defense Appellate Division is deeply interested in this case because the relevant standard of review is implicated in virtually every contested sexual assault case litigated by Army appellate lawyers, and is currently at issue in numerous cases before the Army Court of Criminal Appeals and the Court of Appeals for the Armed Forces. The Defense Appellate Division offers the unique perspective of lawyers in the appellate trenches, litigating cases on a daily basis that involve the very issue in this case—the appropriate standard of review for a trial judge's restriction of cross-examination.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The petition for certiorari should be granted because the Court of Appeals for the Armed Forces applied an abuse of discretion standard, rather than the correct de novo standard of review. The plain language of Military Rule of Evidence (MRE) 412 indicates that decisions to exclude such evidence have constitutional implications, specifically regarding the Sixth Amendment right to confront

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[1] No counsel for a party authored this brief in whole or in part, and no person or party, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of intent to file and have consented to the filing of this brief.

witnesses, thus making a de novo standard of review appropriate.

The Army Defense Appellate Division agrees with the petitioner's argument that evidentiary questions that implicate Sixth Amendment and other constitutional claims should be reviewed de novo. The Defense Appellate Division's experience has generally been with the specific rule of evidence at issue in petitioner's case—MRE 412. Thus, the Defense Appellate Division's brief will explain that rule's implementation in courts-martial and demonstrate that MRE 412 and similar statutes in the civilian realm are a different sort of animal from other evidentiary rules, presenting a need for the extra protection afforded by de novo review.

REASONS FOR GRANTING THE PETITION

Military of Rule of Evidence 412 mirrors Federal Rule of Evidence (FRE) 412, which is also followed by ten states. Kerry C. O'Dell, *Criminal Law Chapter: Evidence in Sexual Assault*, 7 Geo. J. Gender & L., 819, 831 (2006). All fifty states and the District of Columbia have statutes that exclude the purported victim's consensual sexual activity with third parties. *Id.* at 820. Military Rule of Evidence 412 and similar statutes are exclusionary rules; so-called "rape shield" laws that place the sexual behaviors of an alleged victim of a sexual offense beyond the limits of relevancy. *See* Mil. R. Evid. 412(a); Fed. R. Evid. 412(a).

According to the language of MRE 412, any evidence of the "sexual behavior" or "sexual predispositions" of an alleged victim are forbidden from being entered into evidence. Mil. R. Evid. 412(a). Military Rule of Evidence 412(d) defines "sexual behavior" as any behavior that is sexual in nature outside of the charged offense. Mil. R. Evid. 412(d). This same section defines "sexual predisposition" as the alleged victim's "mode of dress, speech, or lifestyle that does not directly refer to sexual activities but that may have a sexual connotation." *Id.* The classic example is that MRE 412 would prevent the admission of evidence that an alleged victim habitually dressed provocatively, as though to say he or she invited the assault.

The rule prescribes strict procedures when contemplating admitting such evidence; not to protect the accused, but to protect the purported victim from potentially humiliating evidentiary arguments in open court. *See* Mil. R. Evid. 412(c)(1). The rule requires notice of the evidence to be offered be given to parties and the court at least five days before pleas are entered. *Id.* This notice must state both the nature of the evidence and the precise purpose for which it is being offered. *Id.* A closed hearing is then conducted outside the view of both the fact-finding panel and the public during which the parties may call witnesses and be heard regarding the admission of the evidence. Mil. R. Evid. 412(c)(2). Thus, the rule prescribes a mini-trial solely for the purpose of determining the evidence's admissibility.

Military Rule of Evidence 412 contemplates that evidence of "sexual behaviors" or "predispositions" might survive this closed hearing process and be deemed admissible under three exceptions. It is the third, MRE 412(b)(1)(C), that is by far the most litigated in military trials and appeals. This exception applies for "evidence the exclusion of which would violate the constitutional rights of the accused." Mil. R. Evid. 412(b)(1)(C). It is identical in form and function to FRE 412 and the prevailing rules in a number of other jurisdictions. *See, e.g.*, Fed. R. Evid. 412(b)(1)(C). In the Defense Appellate Division's experience, every case implicating MRE 412 since 2006 has revolved upon this "constitutional rights" exception.

The "constitutional rights" exception to MRE 412 clearly brings the question of an accused's constitutional entitlements to the forefront of any ruling in which MRE 412 is used to exclude evidence. The exception is an acknowledgement of the fact that a rule which limits an accused's ability to confront witnesses, present a defense, and have his or her matter heard in a public trial must be wielded with extreme caution. Special attention must be paid to the tension between the legitimate protection of victims and the potential for a broad manner of application that destroys the constitutional protections of an accused. A judicial authority, by negative implication of MRE 412(b)(1)(C), must weigh an accused's constitutional rights in every case in which evidence regarding such an alleged victim is sought.

"Rape shield" rules are exceptions to the general precepts of relevant evidence and so warrant the heightened protections offered by de novo review. *Cf.* Mil. R. Evid. 405 (codifying the typical approach to relevant character evidence). One of the side-effects of MRE 412 is to prevent otherwise relevant and admissible evidence that may be critical to the defense from being presented to the fact-finder. When combined with MRE 413, which allows comparable evidence about the accused to be presented to the fact-finder, MRE 412 creates the anomalous result whereby the government is statutorily permitted to present a much broader range of evidence than the defense in sexual assault trials. *See* Mil. R. Evid. 413. Military Rule of Evidence 413 allows the admission of "evidence of the accused's commission of one or more offenses of sexual assault," with very few subject matter or temporal limitations, effectively making any prior sexual offense charge relevant, admissible evidence. The effect of this rule is an exception to the MRE 404 ban on character evidence being used to prove propensity, found in both the Military and Federal Rules of Evidence. *See* Mil. R. Evid. 413, 404.

Under MRE 412 and 413, for example, the government can present evidence of any sexual assault charge from the accused's past as evidence on the merits, but the defense is not allowed to present evidence that the alleged victim frequently fabricates sexual assault accusations. *See generally* Mil. R. Evid. 412, 413. The constitutional implications of such a scenario are clear and warrant close judicial scrutiny to ensure that justice is served. Thus, a de novo standard of review ensures that the rights of an

accused are balanced with the rights of the purported victim.

The adoption of de novo review would not require an appellate judge to re-try every evidentiary ruling made by the trial court. *See Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485 (1984). It would simply grant the appellate courts the power and ability to come to a different conclusion regarding an evidentiary ruling than the trial court below without having to extend deference to the trial court. *Id.* To authorize the de novo standard for cases such as this would merely allow an independent inquiry into whether a trial judge's ruling was sufficient to protect an accused's constitutional interests in an area of the law where they are particularly threatened.

A de novo standard is the appropriate standard of review in cases such as this. After all, MRE 412 and other "rape shield" statutes implicate constitutional issues, but they do so in a closed hearing that is essentially a mini-trial. Considering the complexity of such proceedings and the grave nature of the issues at stake, de novo review is appropriate. Indeed, logic demands that de novo review is necessary.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

MARK TELLITOCCI
Colonel, United States Army
Chief, Defense Appellate Division

JESS B. ROBERTS
Captain, United States Army
Appellate Counsel
Defense Appellate Division

JONATHAN POTTER
Lieutenant Colonel,
United States Army
Senior Appellate Counsel
Defense Appellate Division
901 N. Stuart Street
Arlington, VA 22203
(703) 588-6717
jonathan.potter@conus.army.mil
Counsel of Record